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UNITED NATIONS COMMISSION ON INTERNATIONAL TRADE LAW

Twenty-fourth session

SUMMARY RECORD OF THE 456th MEETING

Held at the Vienna International Centre, Vienna,
on Thursday, 20 June 1991, at 2 p.m.

Chairman: Mr. SONO (Japan)

CONTENTS

International payments: draft Model Law on International Credit Transfers (continued)

Article 9 (continued)

Article 7 (continued)

Article 10 (continued)

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The meeting was called to order at 2.15 p.m.

INTERNATIONAL PAYMENTS: DRAFT MODEL LAW ON INTERNATIONAL CREDIT TRANSFERS (continued) (A/CN.9/341, 344 and Corr.1, 346 and 347 and Add.1)

Article 9 (continued)

1. The CHAIRMAN invited the Commission to consider article 9(5). He said that in its written comments (A/CN.9/347, p. 60, sect. 19) the United Kingdom had proposed that the words "unless the payment order states otherwise" should be added at the beginning of the paragraph.

2. Mr. BHALA (United States of America) said that he opposed the proposal. He suggested the deletion of the paragraph, on the ground that, in the case which it envisaged, the beneficiary's bank would either pay the beneficiary by cheque or notify him that the funds had been deposited. It was up to the originator to inform the beneficiary that funds had been deposited with the beneficiary's bank. The Model Law should not attempt to regulate the relationship between the beneficiary and the beneficiary's bank, yet article 9(5) imposed an obligation on the beneficiary's bank in the situation in which the beneficiary did not even have an account with that bank. From a practical point of view, it should be remembered that some banks received up to 3,000 payment orders falling into that category each day.

3. Mr. GREGORY (United Kingdom) said that it would be desirable to make provision for cases in which there was no existing relationship between the bank and the beneficiary.

4. Mr. SCHNEIDER (Germany) said that, if paragraph 5 was deleted, the effect would be to require the sender to inform the beneficiary about the transaction. His delegation favoured the retention of the paragraph.

5. Mr. IWAHARA (Japan) said that it would be better to keep the paragraph and to amend it in accordance with the United Kingdom proposal.

6. Mr. CRAWFORD (Canada) said that his primary concern was the lack of time available to the beneficiary's bank for execution of a payment order. It ought to be permissible for the beneficiary's bank to transmit a cheque to the beneficiary by post.

7. Mr. GREGORY (United Kingdom) said that he would favour the idea of allowing the beneficiary's bank a longer period for giving notice.

8. Mr. POTYKA (Observer for Austria) suggested that the word "give" should be replaced by the word "send".

9. The CHAIRMAN remarked that the aim of article 9 was to establish a kind of "gentleman's agreement" rather than a criterion for compensation for non-performance within a given time.

10. Mr. GREGORY (United Kingdom) said that article 16(6) provided for the liability of the beneficiary's bank for non-performance under article 9. With that in mind, he saw merit in the Austrian suggestion. However, problems might arise if the expression "send notice" was used in one part of the Model Law and the expression "gives notice" in another.

11. Mr. BERGSTEN (Secretary of the Commission) said that there were precedents in other UNCITRAL documents for using the word "send" in such a context.

12. Mr. ABASCAL ZAMORA (Mexico) said that the implication of the existing text was surely that the parties were bound until the moment of receipt. The point made by the representative of the United Kingdom was important. If the Austrian proposal was nevertheless accepted, that should be done on the understanding that the same solution might not apply in the case of rejection of a payment order.

13. Mr. GREGORY (United Kingdom) said that the solution proposed might be valid for article 9(5), but prove unacceptable in articles 6 and 8, which would require further discussion.

14. Mr. NEWMAN (United States of America) said that the intention of the Model Law should not be to change banking practice. The obligation incumbent on the beneficiary's bank to make the funds available was implicit in the text, but it was for the beneficiary's bank to determine the way in which that obligation was fulfilled.

15. Mr. BURMAN (United States of America) suggested that the word "shall" should be replaced by the words "should if feasible".

16. Mr. KOMAROV (Union of Soviet Socialist Republics) said that it was his understanding that, if a bank received a payment order and the beneficiary had no account with that bank, the latter should be free either to execute the order itself or to find another bank with which the beneficiary did have an account. In that case the transaction would be governed by article 7.

17. Mr. GREGORY (United Kingdom) said that, as he understood it, the duty arising from paragraph 5 of article 9 was similar, although not identical, to that imposed by paragraph 1 of the article. It was not a recommendation but a rule of law.

18. Mr. ABASCAL ZAMORA (Mexico) expressed concern at the contradiction inherent in imposing an obligation on the beneficiary's bank in the text while at the same time saying that the obligation existing between the beneficiary's bank and the beneficiary was regulated by law. If it did that, the Commission would be interfering in the law regulating the relationship between the beneficiary and his bank, which would conflict with its previous decisions.

19. Mr. ADEDIRAN (Nigeria) considered that in practice the situation which the Commission was discussing was non-existent, since if a beneficiary was

(Mr. Adediran, Nigeria)

expecting a payment he would contact the sender to find out where it had been sent. It would be dangerous to impose the obligation in article 9(5) on a bank that had no relationship with the beneficiary.

20. The CHAIRMAN noted from a show of hands that a majority of the Commission approved the existing text of article 9(5) with the addition of the words "unless the payment order states otherwise" at the beginning of the paragraph, as proposed by the United Kingdom. He also noted that the Commission agreed that the question of the liability of the beneficiary's bank should be discussed in connection with article 16.

21. He invited the Commission to take up article 9(4). He said that the position of the United States and the Banking Federation of the European Community, as set out in their respective written comments (A/CN.9/347/Add.1, p. 16; A/CN.9/347, p. 68), was that the account number should prevail in cases of a discrepancy between words and figures. The Working Group had taken a different view and its text was before the Commission. In addition, the United Kingdom had proposed the deletion of the reference to the originator's bank (A/CN.9/347, p. 60, sect. 18). He asked whether there was any support for the idea that the account number should prevail in cases of uncertainty.

22. He noted from a show of hands that there was no support for that idea and that the Commission preferred the existing text with the amendment proposed by the United Kingdom.

23. Mr. DE BOER (Netherlands) said that in his view it was impossible to lay down a general rule on discrepancies between words and figures, since the situation differed according to whether the payment order was electronic or paper-based. Indeed the Model Law did not contain such a rule: the only rule it did provide on the subject was that, when a discrepancy was detected, notice must be given. If the discrepancy was not detected, in his view article 4(5) would operate.

24. Mr. NEWMAN (United States of America) explained that the Society for Worldwide Interbank Financial Telecommunications (SWIFT) system was used by some 85 States, including most of the members of the Commission. Within the SWIFT standard system there were fields identified by both name and number. When automated receiving banks received SWIFT payment instructions, most of them would examine only numbers. Since they would not halt each transaction in order to compare name and number, their procedure was not compatible with the present wording of paragraph 4 of article 9 as to identification of the intended beneficiary. Banks in countries belonging to the SWIFT system would be unable to comply with the rule set out in that paragraph.

25. The CHAIRMAN observed that a clear majority of the Commission had indicated its support for the existing text of paragraph 4 with the change proposed by the United Kingdom.

26. Mr. GREGORY (United Kingdom) said that, at a previous meeting (A/CN.9/SR.454, para. 53), the Commission had indicated its wish for the existing text of article 7(5) to incorporate the notion of detection. He would therefore propose a text for that provision which met the Commission's requirement and also - since a number of the issues raised by article 9(4) were similar to those raised by article 7(5) - a corresponding text for article 9(4).

27. The CHAIRMAN suggested that the Commission should revert to article 9(4) when the United Kingdom text was available.

Article 7 (continued)

28. The CHAIRMAN recalled that at a previous meeting the Commission had decided (A/CN.9/SR.454, para. 42) that one extra day should be provided for notification under article 7(4). He asked whether it wished to allow the receiving bank an extra day for compliance with its obligations under paragraphs 5 and 6 of article 7.

29. After a short discussion in which Mr. GREGORY (United Kingdom) and Mr. NEWMAN (United States of America) took part, the CHAIRMAN said he took it that an extra day should be provided for notification under article 7(5).

30. It was so agreed.

31. The CHAIRMAN said that it also seemed the wish of the Commission to allow the beneficiary's bank an extra day for compliance with its obligation under article 9(2).

Article 10 (continued)

32. The CHAIRMAN said that the following text had been proposed by the United States delegation for paragraphs 2 and 3 of article 10:

> "(2) A notice required to be given under article 7(4) or (5) shall be given as soon as possible but not later than the business day after the day the payment order is required to be executed.
>
> "(3) A notice required to be given under article 9(2), (3) or (4) shall be given as soon as possible but not later than the business day after the date specified in the payment order when the funds are to be placed at the disposal of the beneficiary."

The proposals seemed to be of a drafting nature, in view of the fact that the Commission had agreed to extend by one day the periods referred to in article 10(4) and (5) and article 9(2) and (3). It had also decided to do away with the words "payment date" in article 10(3). That might make it possible to combine paragraphs 2 and 3 of article 10.

(The Chairman)

33. With regard to the United States proposal for article 10(3), the words "when the funds are to be placed at the disposal of the beneficiary" might be replaced by the words "if required to be executed", because the Commission had expanded the notion of execution to embrace execution by the beneficiary's bank.

34. Mr. LE GUEN (France) said that the text proposed by the United States for paragraph 2 of article 10 referred to the business day after the day on which the payment order was required to be executed. However, he wondered how it was possible to speak only of a payment order in that paragraph, since the Commission was setting a deadline for compliance with article 7(4), which dealt in addition with an instruction which was not a payment order. He would like to know how such an instruction could give rise to a requirement of notice. Likewise, the United States proposal for article 10(3) referred to article 9(2), which also dealt with an instruction that was not a payment order. It was not possible for instructions that were not payment orders in articles 7(4) and 9(2) suddenly to become payment orders in article 10(2) and (3). But the problem might be only one of drafting.

35. He found that the procedure of setting different deadlines for different purposes was becoming complex and might not be very practical for the staff of a medium-sized bank. It might be preferable to have a single deadline such as the one laid down in article 10(1); that would be clearer and help to improve the operation of international trade and financial systems.

36. Mr. CONOBOY (United Kingdom) said that his delegation would prefer the phrase "as soon as reasonable" to the words "as soon as possible". The word "possible" could give rise to different interpretations.

37. Mr. BHALA (United States of America) agreed with the French representative that the question of the term "payment order" was a matter of drafting. With regard to the question of deadlines, he agreed on the need for clarity in the text but stressed that they were important because they involved duties of notification which gave rise to liability if they were not met. His delegation could accept the replacement of the word "possible" by the word "reasonable".

38. Mr. CRAWFORD (Canada) recalled that the expression "commercially reasonable" had caused problems when it had been discussed in connection with article 4(3). A possible alternative would be the word "promptly".

39. Mr. BURMAN (United States of America) concurred. He reiterated his delegation's view that the exact phraseology of the provision should be left to the Drafting Group.

40. Mr. LE GUEN (France) disagreed, pointing out that the Commission had not expressed a unanimous opinion on the matter.

41. The CHAIRMAN feared that the inclusion in paragraphs 2 and 3 of article 10 of a qualifying phrase of the kind under discussion could lead to disputes involving claims for breach of contract and damages.

42. Unless he heard any objection, he would take it that the Commission referred the United States proposal for paragraphs 2 and 3 of article 10 to the Drafting Group on the understanding that they would not contain the qualifying phrase "as soon as possible" but would allow an extra day for notice to be given without any element of delay.

43. It was so decided.

44. Mr. BISCHOFF (Observer for Switzerland) said that whatever wording was finally decided on for article 10(2), it should refer to paragraph 6 as well as paragraphs 4 and 5 of article 7.

45. The CHAIRMAN replied that the Commission had decided that an extra day should be allowed for notification under paragraphs 4 and 5 of article 7 but not for action under paragraph 6.

46. Ms. KOSKELO (Observer for Finland) said that one point on article 10(3) might not have been resolved, namely that of the date to which it referred. In many cases, a payment order would not contain a payment date; her preference would be to see the date referred to as an "execution date".

47. Mr. ABASCAL ZAMORA (Mexico) asked for clarification of the relationship between article 10 and the Commission's decision not to allow an extra day for action under article 7(6).

48. The CHAIRMAN repeated that in the discussion on paragraphs 4 and 5 of article 7 the Commission had agreed to provide for an extra day for notification. The decision in regard to article 7(6) had been that no such extra time was required.

49. Mr. LIM (Singapore) pointed out that article 7(6) continued to refer to article 10. He wondered if that was a drafting error.

50. The CHAIRMAN said that was a matter for the Drafting Group.

51. Mr. CONOBOY (United Kingdom) said that the United States proposal for article 10(2) referred to notice being given not later than the business day after the day when the payment order was required to be executed. However, reference back to the decision which the Commission had taken on article 10(1), which dealt with the business day on which the payment order was required to be executed, showed that not one but two days were mentioned, namely the day on which the payment order was received and the following day.

52. The Commission should decide, before referring the paragraph to the Drafting Group, whether the time-limit for notification should be based on the day on which payment was received or the following day. He would like to know whether the extra days contemplated in the United States proposal were cumulative.

53. The CHAIRMAN said that he had assumed that the extra day proposed by the United States was additional to what was provided for under the rule in article 10(1). The reasoning behind that was that the extra day was not intended for normal business but was time required for investigation purposes. He asked the Commission to agree that the wording could be entrusted to the Drafting Group on that basis.

54. It was so decided.

55. The CHAIRMAN invited the Commission to take up article 10(5). He drew attention to the proposal submitted by Canada (A/CN.9/347, p. 10, para. XXXVIII).

56. Mr. BHALA (United States of America) objected that the phrase "ordinary course of business" proposed by Canada was not precise enough. His delegation felt that more than a mere drafting matter was at issue in the Canadian proposal and accordingly it could not support it.

57. The CHAIRMAN noted the absence of outright support for the Canadian proposal. He would therefore take it that the Commission approved the existing text.

58. It was so decided.

59. The CHAIRMAN invited the Commission to take up article 10(6).

60. Mr. SCHNEIDER (Germany) said that he had some difficulty in accepting the paragraph as it stood. He questioned whether it would always be practical to treat branches and separate offices of a bank in different States as separate banks. He cited the example of a group which provided electronic or bank-wide payment systems and had a central office in another State than its head office as well as branch offices in that same State; with the originator's branch and the beneficiary's branch in that same State, payment orders would pass between the branches without there being, in the legal sense, a contractual relationship between them. A bank in that system would be in a position to retain monies for some time without redress. He suggested that the question of regarding separate offices as banks was more complicated than at first appeared.

61. The CHAIRMAN said that his advice from the Secretariat was that branches were mentioned in the Model Law on the assumption that they would conduct transfers independently. If the representative of Germany was linking the branch to the main office and regarding the two as conducting one operation, his position seemed to be very different from that of the Working Group.

62. Mr. SCHNEIDER (Germany) said that he would be satisfied with a mention in the Commission's report that the relationship between a branch and its main office was not a contractual relationship nor deemed to be such.

63. Mr. CRAWFORD (Canada) asked whether in that case the text itself should remain as it was.

64. Mr. NEWMAN (United States of America) said that if the representative of Germany sought it to be placed on record that branches of the same bank were not separate banks, that clashed fundamentally with paragraph 6. In the example which the representative of Germany had given of two branches and a main office, whether connected electronically or not, they were still the same bank in the same State and the originating bank which was one branch would pass a payment order to the head office to pay another branch. The question was whether they were three separate banks or not. If the answer was yes, paragraph 6 should remain as it was; if not, paragraph 6 needed amendment.

65. The CHAIRMAN said that Germany's difficulty appeared to be with the general law of contract, but that had nothing to do with the Model Law. He hoped that an accommodation could be found between the views of the representative of Germany and those delegations which could accept the paragraph as it stood.

The meeting rose at 5.05 p.m.